

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**V.D., Appellant**

**and**

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**DEPARTMENT OF THE NAVY, MILITARY  
SEALIFT COMMAND, Norfolk, VA, Employer**

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**Docket No. 21-0734  
Issued: January 11, 2022**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**ORDER REMANDING CASE**

Before:

ALEC J. KOROMILAS, Chief Judge

JANICE B. ASKIN, Judge

PATRICIA H. FITZGERALD, Alternate Judge

On April 19, 2021 appellant filed a timely appeal from a March 10, 2021 decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> The Clerk of the Appellate Boards assigned Docket No. 21-0734.

On January 29, 2016 appellant, then a 42-year-old supply utility clerk, filed a traumatic injury claim (Form CA-1) alleging that on January 24, 2016 he injured his back when carrying boxes weighing 42 pounds when he lost his balance on an unstable deck while in the performance of duty. He stopped work on January 25, 2016. OWCP accepted the claim for strain of the thorax. On May 10, 2016 it authorized wage-loss compensation on the supplemental rolls beginning March 21, 2016. On July 29, 2016 OWCP expanded the acceptance of appellant's claim to include lumbar sprain. On April 27, 2017 it again expanded the acceptance of his claim to include lumbar intervertebral disc disorder with radiculopathy, and lumbar intervertebral disc displacement.

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<sup>1</sup> The Board notes that, following the March 10, 2021 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

By decision dated January 25, 2018, OWCP issued a formal loss of wage-earning capacity (LWEC) determination based upon appellant's ability to perform the selected position of administrative clerk/office clerk effective February 4, 2018 as he was found to have the capacity to earn wages of \$352.00 per week. It found that the weight of the medical evidence rested with Dr. Amer Ansari, a Board-certified psychiatrist and appellant's attending physician, who found that he could perform the selected position of administrative clerk. OWCP applied the formula set forth in *Albert C. Shadrick* as codified in section 10.403 of its regulations, to determine his loss of wage-earning capacity. It paid appellant wage-loss compensation on the periodic rolls effective August 30, 2019.

In a form report dated February 13, 2019, Dr. Fady Ashamalla, a psychiatrist, found that appellant was totally disabled.

In a January 10, 2020 note, Dr. Margaret Dowdy-Yee, a Board-certified family practitioner, found that appellant was disabled due to lumbar sprain, thorax sprain, lumbar intervertebral disc disorders with radiculopathy, and lumbar intervertebral disc displacement. She provided work restrictions of no lifting over 10 pounds, and no repetitive bending, twisting, or stooping.

On December 10, 2020 appellant requested reconsideration of the January 26, 2016 wage-earning capacity determination. He submitted a statement asserting that Dr. Ansari had given appellant the choice to return to light-duty work or to find him totally disabled. Appellant further asserted that he had been unable to secure work as an office clerk.

By decision dated March 10, 2021, OWCP denied appellant's request for reconsideration finding that it was untimely filed and failed to demonstrate clear evidence of error.

The Board, having duly considered this matter finds that this case is not in posture for decision.<sup>2</sup>

Once the wage-earning capacity of an injured employee is determined, a modification of an LWEC determination is unwarranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was erroneous.<sup>3</sup> The burden of proof is on the party seeking modification of the wage-earning capacity determination.<sup>4</sup> Unlike reconsideration pursuant to 5 U.S.C. § 8128(a), there is no time limitation for requesting modification of an LWEC determination.<sup>5</sup> Requests for "modification" should be reviewed carefully to determine whether

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<sup>2</sup> *C.H.*, Docket No. 19-114 (issued April 30, 2020); *B.H.*, Docket No. 18-1515 (issued June 20, 2019); *N.M.*, Docket No. 17-0262 (issued July 3, 2017).

<sup>3</sup> 20 C.F.R. § 10.511; see *Tamra McCauley*, 51 ECAB 375, 377 (2000); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Modification of Loss of Wage-Earning Capacity Decisions*, Chapter 2.1501.3 (June 2013).

<sup>4</sup> 20 C.F.R. § 10.511.

<sup>5</sup> *W.W.*, Docket No. 09-1934 (issued February 24, 2010); *Gary L. Moreland*, 54 ECAB 638 (2003).

the claimant is seeking a reconsideration of a recently issued LWEC decision, as opposed to a modification of the LWEC determination.<sup>6</sup>

The Board finds that appellant's December 10, 2020 request for reconsideration was, in fact, a request for modification of the January 25, 2018 LWEC determination. Appellant specifically alleged error in Dr. Ansari's October 17, 2016 report, upon which the LWEC determination was based. He further submitted additional medical evidence addressing a material change in the nature and extent of the injury-related condition. It is well established that a claimant may establish that a modification of an LWEC determination is warranted if there has been a showing that the original determination was, in fact, erroneous<sup>7</sup> or if there is a material change in his injury-related conditions.<sup>8</sup>

The Board has held that when an LWEC determination has been issued and appellant submits evidence with respect to one of the criteria for modification OWCP must evaluate the evidence to determine if modification is warranted.<sup>9</sup>

As OWCP improperly reviewed the case under the standard for an untimely reconsideration request, the case must be remanded to OWCP for a proper decision which includes findings of fact and a clear and precise statement regarding whether appellant has met his burden of proof to establish modification of his LWEC determination.<sup>10</sup> The Board consequently remands the case to OWCP for proper adjudication, to be followed by an appropriate decision.

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<sup>6</sup> *Supra* note 3 at Chapter 2.1501.4a (June 2013).

<sup>7</sup> 20 C.F.R. § 10.511; *L.P.*, Docket No. 20-0154 (issued April 7, 2021); *Y.R.*, Docket No. 18-1464 (issued February 22, 2019).

<sup>8</sup> *See T.D.*, Docket No. 20-1088 (issued June 14, 2021); *L.M.*, Docket no. 20-1028 (issued March 10, 2021); *S.V.*, Docket No. 19-1521 (issued February 22, 2021).

<sup>9</sup> *L.P.*, *supra* note 7.

<sup>10</sup> *Id.*; *L.H.*, Docket No. 18-1787 (issued July 29, 2019); *R.Z.*, Docket No. 17-1455 (issued February 15, 2019).

**IT IS HEREBY ORDERED THAT** the March 10, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: January 11, 2022  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board